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“UNDER THE INFLUENCE”: PORNOGRAPHY AND ALCOHOL — SOME COMMON THEMES

by

JEROME O'CALLAGHAN*

The secret thoughts of a man run over all things, holy, profane, clean, obscene, grave, and light, without shame, or blame¹

[A]t a Spring, 1990 company meeting, [a Simon & Schuster editor] had to show a sample chapter to the rest of the staff. In the sample, a woman's breasts were hooked to a high-voltage battery and they exploded and burned; in another sequence, a starving, live rat was stuffed into a woman's vagina. Women employees, seeing the text for the first time, were stunned and horrified.²

I. INTRODUCTION

This paper examines the regulation of pornography outside the usual framework of First Amendment argument. Though it may seem heretical to some, this article postpones First Amendment discussion in order to promote a novel understanding of pornography regulation. For reasons explained in a later section, I believe First Amendment arguments are not dispositive of this issue. While free speech may be the gravamen of courtroom argument, there nevertheless remain underlying questions concerning the logic of anti-pornography reform that can be best seen outside the glare of free speech rhetoric.

My focus is the problem of identifying and quantifying the consequential harm of pornography consumption. This problem has been well attended by those, such as Professor MacKinnon,³ who see pornography at the root of

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1. THOMAS HOBBS, *LEVIATHAN* 52 (Richard Tuck ed., 1991).

2. Robert Brannon, *Torturing Women as Fine Art: Why Some Women and Men Are Boycotting Knopf*, in *MAKING VIOLENCE SEXY* 239, 240 (Diana E.H. Russell ed., 1993).

3. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991).

most, if not all, gender inequality. A central, and troublesome, part of the anti-pornography argument lies in the difficult realm of consequence/responsibility. Even assuming that pornographic materials have identifiable harms associated with them, there remain some extremely delicate issues for the law to tackle. For example, the law must address how to determine the extent of pornography's influence on behavior, in order to establish the threshold that must be reached before regulation is necessary. These issues, revolving primarily around the question of quantifying the effect of pornography, will be central in this discussion.

In order to explore these issues in the regulation of pornography I will create an analogy to the regulation of drunk driving (DUI).⁴ The analogy arises from the particular ambiguity of the term "under the influence." It is now widely accepted in our popular culture that being under the influence of drugs has a public meaning that justifies governmental response in both civil and criminal contexts.⁵ More specifically, the public now understands that being under the influence is "harmful." The primary harm lies in an elevation of risk posed to others. The harm posed to the self is typically a secondary consideration.

By analogy, MacKinnon's claim can be understood to assert that our society is under the influence of pornography, and its influence is harmful. Pornography's harm is also, at least in the writing of MacKinnon, harm done to others. While she pays close attention to the experience of female participants in the pornography industry,⁶ she shows little concern for the state of the consumer of pornography. The "victims of pornography," a term that usually means the victims of pornography's consumers,⁷ constitute the essence of the anti-pornography movement.⁸ Likewise the victims of alcohol,

4. For the sake of brevity drunk driving laws (including civil and criminal remedies) will be labeled "DUI" i.e., laws that regulate 'driving under the influence' of alcohol.

5. There are some substantial qualifications to this assertion, e.g., being under the influence of *some* drugs, under *particular* circumstances. These qualifications may need further examination, but for now the parallel between alcohol and pornography regulation is the central analogy.

6. For example, see MacKinnon's discussion of Linda Marchiano, star of the movie *Deep Throat*, in MACKINNON, *supra* note 3, at 128.

7. Extending the analogy a little further, one could argue that the ultimate problem in DUI and pornography is a "false ideology." In the former instance, it is the once-widespread belief that drinking and driving were perfectly compatible behaviors. In the latter instance it is the widespread belief that pornography is a source of harmless titillation. In that context, both men and women suffer from a false consciousness. However the agenda of the anti-pornography movement veers consistently toward protecting female victims from male aggressors.

8. Those who attended the Speech Equality and Harm Conference at the University of Chicago Law School can attest to the crusade-like vigor of these reformers. They know the victims and they know the perpetrators; the dividing line is usually gender. See Stephanie B.

at least in the DUI context, are the actual victims of alcohol's consumers. They too were the symbolic driving force of a reform movement.⁹

This Article will first develop the analogy between DUI and pornography reform.¹⁰ Next, the Article will consider the necessary axioms of reform relevant to both policy areas.¹¹ Third, the potential effect of social science on reform will be explored.¹² Fourth, this Article will discuss the political dimension of First Amendment doctrine, and will suggest that First Amendment arguments are not dispositive of the debate.¹³

II.A. THE ANALOGY: PORNOGRAPHY AND DUI

A central claim made against pornography is that it generates harm, and further, the extent of harm is of such a magnitude as to justify punishment not just of the immediate malfeasor, but of the influencer as well. The analogy with DUI seems particularly intriguing. Consider the origin and growth of drunk driving policy. DUI's origin as a policy *problem* lies in two widely accepted, if ultimately incompatible, social practices. Annexed to these practices are thousands of injuries on the highway each year. Typically injuries are caused, in the obvious and immediate sense, by the wrongful actions of a particular individual. To the extent that the law cared to pursue the issue,¹⁴ the old standards required that the individual bear full responsibility for the harm. Today, as a result of a furor instigated by interest groups,¹⁵ these standards have been radically altered.¹⁶ Two changes are particularly noteworthy. First,

Goldberg, *1st Amendment Wrongs*, CHI. TRI., Mar. 17, 1993, at 15, and Isabel Wilkerson, *Foes of Pornography and Bigotry Join Forces*, N.Y.T., Mar. 12, 1993, at B16. The term "movement" is particularly appropriate for this group of activists.

9. Mothers Against Drunk Driving (MADD), the most prominent of DUI reform groups, began when the daughter of its founder was killed by a drunk driver. Otto Friedrich et al., *Seven Who Succeeded*, TIME, Jan. 7, 1985, at 40, 41.

10. See *infra*, section II.A.

11. See *infra*, section II.B.

12. See *infra*, section II.C.

13. See *infra*, section II.D.

14. Drunk driving has been an area of notoriously lax law enforcement. "In recent years growing protest against the relatively light sentences handed out to [DUI defendants] has led to demands for much stiffer penalties, including mandatory jail sentences. MADD (Mothers Against Drunk Driving) has been especially influential in this campaign, which has led to tougher laws in many states." JOHN C. SHEA, *AMERICAN GOVERNMENT AND POLITICS* 397 (1987).

15. See *supra* note 14.

16. One should note an important interim development in this process of legal reform: consciousness raising. The interest groups' campaign to heighten mass awareness of highway injury is an important element in the context of legal reform.

liability has been expanded beyond the blameworthy driver. No longer is just the drunk driver to blame, so also is the bartender and the social host.¹⁷ Other contributory variables such as weather conditions, car failures, or even highway design, may or may not pass a threshold of relevance in the determination of legal liability.¹⁸ Second, through intensive enforcement, criminal liability applies *even when no injury exists*. Due to the notable contributions of drunk drivers to highway accidents, their very existence on the highway constitutes an elevated risk, which, in turn, is understood to justify sanction. Elevating the risk of injury has become punishable as a criminal act, though no actual harm, in the traditional sense, has been done.¹⁹ Elevated risk has become a "virtual injury."

The parallels of DUI reform with the anti-pornography movement are striking. Like the DUI reform movement, the anti-pornography movement originates from a widely accepted practice, this time it is the consumption of pornography. Whether measured in terms of retail sales, the public-celebrity status of the playmate of the month,²⁰ the general boys-will-be-boys refrain

17. Developments in tort law, some reaching back to the 1950s, support the extension of liability to bartenders and social hosts. Originally this liability was limited to situations where minors had been served alcohol. Many jurisdictions now apply it in much broader circumstances. *See generally* John R. Ashmead, Comment, *Putting A Cork On Social Host Liability: New York Rejects A Trend: D'Amico v. Christie*, 55 BROOK. L. REV. 995 (1989); Laura Hoexter, Note, *A Minor Hazard: Social Host Liability In Washington After Hansen v. Friend*, 68 WASH. L. REV. 227 (1993); Bryan D. Kocher, Note, *Tort Law-Common Law Negligence — Liability of Commercial Vendor of Alcohol — Duty Derived From Criminal Statute*, 26 DUQ. L. REV. 793 (1988); Cristhia Lehr Mast, Note, *Social Host Liability In Missouri; Childress v. Sams*, 53 MO. L. REV. 839 (1988); Jacob R. Pritcher, Jr., *Is It Time To Turn Out The Lights? Social Host Liability Extended To Third Persons Injured By Intoxicated Adult Guests*, 22 TEX. TECH. L. REV. 903 (1991).

18. Typically other more politically sensitive factors that could be interpreted as the root of much highway injury are not treated as such in the courts. *See* JOSEPH GUSFIELD, *THE CULTURE OF PUBLIC PROBLEMS: DRINKING — DRIVING AND THE SYMBOLIC ORDER*, 174-75 (1981); Ross, *Limitations on Deterring the Drinking Driver*, in *ALCOHOL, DRUGS, AND TRAFFIC SAFETY: PROCEEDINGS OF THE NINTH INTERNATIONAL CONFERENCE ON ALCOHOL, DRUGS, AND TRAFFIC SAFETY* 68 (Sidney Kaye & Gilbert W. Meier eds., 1983).

19. This presents a peculiar and difficult problem not much discussed in the literature. Most legally-drunk drivers do not have traffic accidents — many drive safely to their destinations. Most of this group have suffered some impairment of important motor skills, and that is the justification of legal intervention. Yet a blood alcohol content (BAC) score of 0.10% does not impair all drivers. Some individuals perform well on standardized motor-skills tests after their BAC has reached 0.10%. "Another aspect which seems to have been overlooked is the rapid development of functional tolerance. Judging even from the mean effect, most individuals perform better when their BAC has been high for a period of hours, compared to the immediate effects of alcohol, and, again, some persons show this . . . phenomenon to a large degree. Existing laws seem to disregard this possibility entirely." James R. Wilson & Robert Plomin, *Individual Differences in Sensitivity and Tolerance to Alcohol*, 32 SOC. BIOLOGY 162, 182-83 (1985).

20. Professor MacKinnon has claimed "*Playboy* is a bona fide part of the trade in women. . . . *Playboy*, in both text and pictures, promotes rape." *See* Andrea Dworkin & Catharine

that accompanies discussion of "girlie" pictures, etc., the consumption of pornography is "normal" behavior. The harm, in what may turn out to be a related development, is manifested in a variety of forms: sexual assault, verbal abuse, violence against women generally, and discrimination in the workplace.²¹ These harms were likewise once thought to be the full responsibility of the immediate actor, the wrongdoer. For the last ten years, the reform argument is that liability for harm must be extended to the purveyors of material that cause or influence the assailant's actions.²² Those who put him "under the influence" will share the blame. Reformers argue that the very availability of this material constitutes a danger, an elevated risk, to the well being of readily-identifiable and vulnerable individuals, and ultimately, the community.

At least at this superficial level there is a useful parallel between the reforms sought by anti-pornography forces and the reforms in fact achieved by DUI activists. But the details of justifying reform raise more questions than answers. The closer one looks the more difficult it becomes to agree with the maxim that "[p]ornography is the theory, and rape the practice."²³

II.B. AXIOMS OF REFORM

Consider the details involved in the logic of punishing the drunk driver. At some point the political community²⁴ must accept the following axioms:

- a1) alcohol, when consumed, impairs motor function;

MacKinnon, *Questions and Answers*, in *MAKING VIOLENCE SEXY* 78, 79 (Diana E.H. Russell ed., 1993). The Indianapolis ordinance that she co-authored reached beyond violent material and could easily have been used to attack mainstream nonviolent pornography such as *Playboy*. See generally DONALD A. DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* (1989). In other circumstances, Professor MacKinnon does not appear to be centrally concerned with mild mainstream pornography; to add zest to her arguments she relies on descriptions of extremely violent pornography. See Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991).

21. Indeed, one federal appeals court has already accepted as fact a link between pornography and a broad variety of harms to women: "[W]e accept the premises of this [anti-pornography] legislation. Depictions of subordination tend to perpetuate subordination, [t]he subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets." *American Ass'n of Booksellers v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

22. One of the seminal anthologies of this movement was published in 1980. See *TAKE BACK THE NIGHT* (Laura Lederer ed., 1980).

23. Robin Morgan, *Theory and Practice: Pornography and Rape*, in *TAKE BACK THE NIGHT*, *supra* note 22, at 134, 139.

24. This community, whether defined in pluralist terms or as an elite, will inevitably depend on relevant policy experts. In drunk driving policy, the National Highway Traffic Safety

b1) the presence of alcohol in the body can be accurately detected and measured;

c1) a direct and causal relationship exists between the volume of alcohol consumed and the degree of impairment;

d1) the higher the degree of impairment the greater the risk of injury to self or others;

e1) there is, for most people, a relatively safe amount of alcohol in the blood, and this amount can be measured;

f1) based on this measurement a threshold²⁵ can be identified beyond which activities which involve motor function (such as driving) become significantly more dangerous;

g1) knowing the impairment effect of alcohol to be temporary, the danger of an impaired individual is also temporary.

Now consider a similar set of axioms, this one explaining the logic of pornography reform:

a2) pornography when consumed impairs "social judgments"²⁶;

b2) the presence of pornography's influence on the mind can be accurately detected and measured;

c2) a direct and causal relationship exists between the volume of pornography consumed and the degree of impairment;

d2) the higher the degree of impairment the greater the risk of injury to self or others;

e2) amounts of pornography that are relatively safe, for most people, can be measured;

f2) based on this measurement a threshold²⁷ can be identified past which activities such as social interaction become significantly more dangerous (i.e. the public suffers an elevated risk);

g2) assuming the impairment effect of pornography to be temporary, the danger of an impaired individual is also temporary.

Administration has been a vital source of both information and policy recommendations.

25. Legislatures typically opt for a blood-alcohol content (BAC) level of .08% or .10%. There is some "arbitrariness" to these thresholds, as argued in *supra* note 19.

26. "Social judgments" refers here to judgments about how to behave in situations involving social interaction.

27. The fact that the threshold identifies impairment of the average person, not the particular defendant, should be no bar to its creation. See *supra* note 19.

provided interested groups with research findings. NHTSA's research has the appearance of being disinterested and non-political. This provides an interesting contrast between DUI and anti-pornography reform campaigns. The issue of ideologically-motivated research is much more likely to be raised when the subject matter is as politically turbulent as relations between the sexes.⁵³

II.D. POLITICS AND THE FIRST AMENDMENT

The heart of the political struggle lies in axiom a2, which alleges that the presence and influence of pornography on the mind can be accurately detected and measured. Unlike the mechanics of the human body, bad social judgment (in this instance a distorted, if not degrading, view of women and/or the relationship between the sexes) is determined by value systems. Recall that under the analogy presented in this paper, the individual under the influence of pornography is a fit subject for criminal punishment,⁵⁴ comparable to the drunk driver who is attempting to drive home safely. This view is a necessary corollary of the campaign to prevent the harms caused by pornography. Inherent in the anti-pornography argument is the assumption that persons can be punished for having the wrong value systems, or the wrong point of view. In sum, it is a perspective that considers the elevated risk of harmful behavior to be punishable.

There is no necessary antagonism between the anti-pornography view and the history of civil liberties in the United States. On some occasions punishing someone for a point of view has been politically unacceptable. On others it has not. The evidence of public attitudes toward civil liberties is anything but reassuring.⁵⁵ In the courts, where an elite perspective presumably dominates, the speaker's ideology is often central to deciding culpability.⁵⁶ Even the more liberal defenders of free speech acknowledge limits to

53. See *supra* note 44.

54. With the caveat that the individual has passed an "influence threshold."

55. "More than 40% [of the public] would ban homosexuals' books from libraries." See LEWIS LIPSITZ & DAVID M. SPEAK, *AMERICAN DEMOCRACY* (2nd ed. 1989). See also MICHAEL CORBETT, *POLITICAL TOLERANCE IN AMERICA* (1982).

56. See *Schenck v. United States*, 249 U.S. 47 (1919). To find the content of *Schenck's* leaflet see RICHARD POLENBERG, *FIGHTING FAITHS* 212-14 (1987). Likewise see *Debs v. United States*, 249 U.S. 211 (1919) (not just the decision but the speech made in Canton), and *Abrahms v. United States*, 250 U.S. 616 (1919) (again note the central evidence, reprinted in POLENBERG, *supra* note 56, at 49-55). While on its face the *Schenck* decision is not about a point of view, those who read the leaflet before reading the Supreme Court opinion are likely to reach a different conclusion. This observation also holds true for the *Debs* conviction — *Debs's* speech is a remarkably tame and unadventurous exercise in rhetoric. His point of view, combined with his place in the public eye, were the core of the "danger" found by the Supreme Court.

its reach. A decision as generous to speakers as *Brandenburg v. Ohio*⁵⁷ gives the government the power to punish speech when violence is imminent. Theoretically there is a difference between the question of imminent violence and the point of view of the speaker. Unfortunately that difference dissolves when one looks to the fate of political radicals in U.S. courts.⁵⁸

It is not clear that the body politic believes that men under the influence of pornography are, per se, a danger. However public opposition to violent pornography is clear. Public opinion polls indicate that there is substantial support for the prohibition of violent pornography.⁵⁹ Further, a majority of the public believes that "sexually explicit material" leads to a breakdown of morals, causes some people to lose respect for women and others to commit rape or sexual violence.⁶⁰ It is not clear if the respondents in that survey had violent or nonviolent pornography in mind when they answered. According to Professor MacKinnon: "Polls tell us that most Americans believe there is a causal link between pornography and sexual violence."⁶¹ Despite this claim, in the period between 1986 and 1991 a slight majority emerged *against* harsh restrictions on the availability of sexually explicit material.⁶² Ambivalence appears to be the chief characteristic of a public that links pornography to

Similarly the decisions on Communist Party organizers indicate that the Court took alarm at that radical point of view. A conviction for conspiracy to advocate violent overthrow is easy to uphold when the point of view is that radical. See *Dennis v. United States*, 341 U.S. 494 (1951).

57. 395 U.S. 444 (1969).

58. "In short, in times of war and crisis the clear and present danger doctrine, even in its beginnings, was the hostage of judicial subjectivity. When legislative and popular passions were aroused during World War I and the 'Red Scare' of the 1920s, the doctrine failed to provide the protection, even at the hands of its authors, that literal adherence to its doctrinal formulation might have promised. The same judicial scenario was replayed in the Red-baiting legislation of the McCarthy era . . ." JEROME A. BARRON & C. THOMAS DIENES, *HANDBOOK OF FREE SPEECH AND FREE PRESS* 15 (1979). "The Supreme Court's earliest and most enduring efforts to pronounce a stable First Amendment doctrine reveal the Court at its weakest, vulnerable to periodic inflamed public hysteria against dissenters despite the outward appearance of detached, dispassionate adjudication" and "[i]n summary, the Court's modern tradition of seditious libel consists of two distinct and fundamentally irreconcilable traditions. The dark tradition, in which government critics were throttled, began with the Holmes Red Menace trilogy and was carried forward in *Dennis*. The enlightened tradition is one of tolerance for those who defy the prevailing orthodoxies of the day." Judith Schenck Koffler, *The New Seditious Libel*, in *FREEDOM AT RISK*, 140, 143, 159 (Richard O. Curry ed., 1988).

59. See GALLUP REPORT, 2 (Aug. 1986).

60. Data from a NEWSWEEK/GALLUP Poll reprinted in MCMANUS, *supra* note 37, at 257.

61. MacKinnon cites Newsweek, Time and ABA polls, as well as a Women's Day survey that found 80% of respondents (typically homemakers) in support of a ban on all pornography. See Mackinnon & Dworkin, *supra* note 20, at 94-95.

62. In a national poll 47% of respondents said standards should be kept as they are, while 6% thought they should be less strict. See GALLUP MONTHLY POLL, 61 (Oct. 1991).

formation of specific hypotheses [and] influenced the choice of dependent variables."⁴³ Further, the "interpretation of ambiguous or inconsistent study results has also been undertaken within the 'mindset' of each perspective."⁴⁴ In conclusion, two of the most prominent researchers in this field can only offer this: "the ability of one theory to account for the data better than the others is questionable. We cannot, at this stage, clearly prefer one theory over another."⁴⁵

Assuming, as current trends indicate,⁴⁶ that conventional wisdom will conform to research conducted from a feminist perspective, there remains the question of identifying with some degree of clarity the relevant threshold (axiom f2). We must measure the likelihood of impaired judgment at various degrees of consumption. We must also measure the longevity of the effect. As in alcohol regulation, the threshold figure would then become part of the law. That the figure may be somewhat arbitrary⁴⁷ need not pose a problem — BAC levels in state statutes only approximate the state of drunkenness.⁴⁸

The real difficulty for pornography regulators is how to express the threshold figure. No clear resolution of this problem is apparent. Nothing in the research vaunted by the anti-pornography movement, or elsewhere, indicates some uniform unit of measurement for being "under the influence" of pornography. To the extent that an individual is exposed to pornography he/she is in a broad sense, "under the influence" of that material. However, the individual may be simultaneously under the influence of hundreds of other stimuli. Why must pornography dominate? Is there a possibility of an antidote? Could regular doses of *Playboy* and *Ms.* balance each other out?

Some research suggests that harmful speech can be defused by "corrective speech." One example is evident in an experiment where

male and female subjects were exposed to sexually explicit stories depicting either rape or mutually consenting intercourse. Afterward, the men and women exposed to the rape version were given statements emphasizing that the depiction of rape in the stories they read was fallacious, and that in reality rape is a terrible crime. Subjects were also given specific

43. LINZ & MALAMUTH, *supra* note 32, at 15.

44. *Id.*

45. *Id.* at 59.

46. *See infra* notes 59-60 and accompanying text.

47. *See supra* note 19 (commenting on the inaccuracy of the assumption that all DUI drivers are actually impaired).

48. One person at 0.07% BAC may be a greater danger on the road than another individual with 0.12%. *See supra* note 19. While such an occurrence is bound to be rare, it is still true that the law is designed to punish the safer driver, no matter how unjust this particular outcome.

examples of rape myths with assurance that these commonly-held beliefs are fictitious. These subjects who were exposed to the rape stories, as well as debriefed, were less inclined to see women as wanting to be raped and to see victim behavior as a cause of rape than were subjects who read the consenting story but received no debriefing. In a conceptual replication of this experiment, Check and Malamuth . . . found that men exposed to a rape debriefing gave a rapist described in a newspaper report more severe sentencing and were less likely to view the rape victim as responsible for her own assault.⁴⁹

These results obviously lend support to the liberal argument that the best response to offensive speech is more speech.

It is already apparent that the logic of the anti-pornography argument raises enormously difficult questions.⁵⁰ Likewise the difficulties involved in getting political support for the argument developed by axioms a2 - g2 are, I think, readily apparent, and need only brief mention.

Axiom b2, postulating that the presence and influence of pornography on the mind can be accurately detailed and measured, presents enormous obstacles for the reform movement. First is the problem of measurement, for which no obvious solution is apparent. One possible method of measurement might be to use mere possession as a proxy. However, evidence of the mere exposure to pornography can hardly suffice to indicate a legally sufficient degree of influence. This would turn axioms d2-f2 into dead letters and in effect would be a return to Prohibition. Assuming Prohibition to be unacceptable in the foreseeable future, some other method of measuring the extent of pornography's influence on the consumer will be essential.

Axiom c2, postulating that there exists a direct and causal relationship between the volume of pornography consumed and the degree of impairment, provides another locus for scientific debate. Some studies examining the significance of quantity of consumption have focused on a theory of "habituation."⁵¹ They found that material that was originally stimulating becomes boring as exposure increases. The effects of "excessive" pornography consumption have not yet been established.⁵²

Axiom d2, postulating that the higher degree of impairment of "social judgments," the greater the risk of injury to self or others, is another matter in the hands of research scientists. Interestingly, in the case of drunk driving, the National Highway Traffic Safety Administration (NHTSA) collected and

49. LINZ & MALAMUTH, *supra* note 32, at 42.

50. This is not to suggest that the traditional free-speech arguments are necessarily superior.

51. *See supra* notes 33-35 and accompanying text.

52. Linz's authoritative survey of the state of the research does not include reference to such work.

graphic magazines, watches hundreds of such movies, etc., is more likely to have a distorted view of the female sex and the relationship between the sexes, than one who occasionally "indulges" between long bouts with respectable newspapers or scholarly journals. Thus, like alcohol, the volume of pornography consumed (and the strength of the material) are relevant factors. As all the axioms apply, the difficulties presented by e2 and f2 must be surmounted. No equivalent of the "% alcohol by volume" standard exists to aid the consumer in his appraisal of pornographic material, nor is one likely to appear in the near future.

As already argued, the problem of measuring the influence of pornography is enormous. It is also one that is the object of a great deal of empirical research. The skepticism that greets the anti-pornography movement is largely based on concerns about how well science understands the influence of pornography on subsequent behavior. Professor MacKinnon is certain of pornography's harm. Recently she reminded the legal community of the details:

Over time, the evidence on the harm of pornography has only become stronger. When explicit sex and express violence against women are combined, particularly when rape is portrayed as pleasurable or positive for the victim, the risk of violence against women increases as a result of exposure. It is uncontroversial that exposure to such materials increases aggression against women in laboratory settings, increases attitudes which are related to violence against women in the real world, and increases self-reported likelihood to rape. As a result of exposure, a significant percentage of men, many not otherwise predisposed, as well as the twenty-five to thirty-five percent who report some proclivity to rape a woman, come to believe that violence against women is acceptable. Materials which combine sex with aggression also have perceptual effects which desensitize consumers to rape trauma and to sexual violence. In one study, simulated juries who had been exposed to such material were less able than real juries to perceive that an account of a rape was an account of a rape, through which the victim was harmed.³⁶

When the Meese Commission published its report on pornography, which exhaustively detailed pornographic material in a wide variety of forms,³⁷ one could only wonder how much the Commission members themselves had been influenced/corrupted by the material they found so dangerous. Not surprisingly research on consumption and correlated behavior patterns has become the heart of the matter (analogous to studies of "alcohol-

36. MACKINNON, *supra* note 3, at 800.

37. See MICHAEL J. MCMANUS, FINAL REPORT OF ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, ch.24 (1986).

related" highway injury).³⁸ If the reform movement is to find long term success, the scientific research must produce widely accepted results indicating pornography's harmful effects. It must generate a new conventional wisdom.³⁹

II.C. RESEARCH, SCIENCE AND POLITICS

In a recent survey of more than 20 years of pornography research, Linz and Malamuth explored three common normative theories about pornography/obscenity/erotica.⁴⁰ The conservative-moralist theory posits pornography as a cause of degeneration in society. The liberal theory posits pornography as an element in the free flow of ideas. Only when pornography is shown to have directly caused harm is it subject to government regulation. The feminist theory posits pornography as part of the exercise of power by men over women. Pornography perpetuates a view of women as second-class citizens, and encourages discrimination, sexual harassment, and sexual assault. Combining through the research, Linz and Malamuth found a wide variety of studies in support of all three theories.

While it is true that feminist theories of pornography's effect have significant empirical support,⁴¹ it is also true that contradictory conclusions can be culled from the journals.⁴² The fact that research supports all three theories is in part explained by the very process of framing the research question. The three normative theories "guided scientific research, . . . influenced the

38. It is often assumed that the common estimate of alcohol-related injuries, 50% of all highway injuries, is uncontroversial. In fact some experts dispute the 50% figure as a gross exaggeration. See H. Laurence Ross & Graham Hughes, *Drunk Driving: What Not To Do*, NATION, Dec. 13, 1986, at 663.

39. "Alcohol-related highway injury" is not nearly as controversial a label as "pornography-related sexual assault" or "pornography-related wage discrimination."

40. LINZ & MALAMUTH, *supra* note 32. Both authors are nationally recognized authorities on pornography. They have been counted as allies of the anti-pornography movement. Recently, however, they have faced criticism from prominent feminists. See Diana Russell, *The Experts Cop Out*, in MAKING VIOLENCE SEXY, *supra* note 2, at 151-66.

41. In particular: i) depictions of sexual violence "may be a stimulant for a considerable portion of the general male population," ii) exposure to depictions of a rape myth results in a calloused attitude toward rape victims, iii) in a laboratory situation exposure to violent pornography "can increase aggression toward women," iv) women also become "desensitized to violence against women as a function of exposure to sexual violence in the media." LINZ & MALAMUTH, *supra* note 32, at 47-55.

42. "[T]here is little conclusive evidence of [pornography's] harmful effect, and in particular no confirmation of a causal link between sexual expression and any sort of antisocial behavior." RICHARD S. RANDALL, FREEDOM AND TABOO 264 (1989). "[W]e can conclude that some forms of pornography, under some conditions, promote certain antisocial attitudes and behavior." EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY 171 (1987). See also RONALD J. BERGER ET AL., FEMINISM AND PORNOGRAPHY (1991).

This comparison illustrates an important difference between the two reforms — in drunk driving policy there is an assumption that a moderate level of consumption, being mildly under the influence, is of minimal danger and is, as such, not worthy of sanction.²⁸ This conclusion is a political judgment — at another time in U.S. history, alcohol's dangers were considered to be so pervasive as to warrant complete prohibition. The ultimate fate of Prohibition as a public policy initiative may be an important lesson for anti-pornography reformers.

Some anti-pornography reformers²⁹ allege that all pornography pollutes, and so the issue of volume consumed is irrelevant. For this group axioms a2) through g2) can be reduced to these simple propositions

a3) pornography impairs social judgment;

b3) the presence of pornography in the mind/person can be accurately determined;

c3) the distribution and/or consumption of pornography is itself an elevation of risk to the public which warrants sanction.

Yet this Prohibition-style route raises two difficult problems. The first as noted above, is that the history of Prohibition suggests that it is not an approach to be emulated. The second is timing. If pornography is a danger per se, and consumption by men³⁰ raises risk to a significant level of danger, then should the issue of timing (axiom g2) become more, or less, central? Why should a teenager's consumption of one issue of *Playboy* be determined to be relevant, or influential, in understanding, say, an assault,³¹ some 10 years later? The Prohibition approach suggests that independent will cannot act as a filter for messages received, that the mind is permanently a victim of ideas consumed, and that the mind is permanently altered by this material. Why should this be true of pornography? Would it be also true of any other kind of message received? Could a teacher expose a class to pornography as part of an experiment³² (or in an effort to explain misogyny) without inflicting permanent injury?

28. Even public drunkenness laws comport with this approach, as they do not extend to all drinkers. Indeed public drunkenness laws, unlike DUI laws based on BAC, require some evident impairment.

29. "Connecting pornography to all forms of woman-hating, we demand its elimination." Martha Gever & Marg Hall, *Fighting Pornography*, in TAKE BACK THE NIGHT, *supra* note 22, at 279, 284. There is also some evidence of public support for a ban on all pornography. See *infra* note 61.

30. Identifying women as immune to the dangers of pornography raises an interesting problem with the analogy, see the discussion of a "faulty analogy" post.

31. One might substitute for assault a misogynist frame of mind.

32. This is often the case in psychology experiments. Many important studies of

The apparent extremism of this position merits careful consideration. Concededly, the mind may have an ability to cling to ideas for a long time after a brief exposure. However, despite the fact that the effect of a sip of wine is bound to wear off, the extremists hold that the effect of one sentence from the Bible, or one peek at a centerfold, might last a lifetime. While the theoretical aspect of this issue is intriguing, the practical question remains: how is the law (courts, judges, jurors) to know the life span of the toxic effect of pornography? Neither the rhetoric nor the analysis of the anti-pornography movement provide an answer to this puzzle.

A more moderate approach assumes that pornography's ill effects are, like alcohol's, temporary. Given a temporary effect, and the apparent ability of women to resist the harmful message of pornography, axiom c3) becomes untenable. The only solution is to abandon a3-c3 and return to the full set of axioms: a2-g2. Acknowledging a temporary effect brings a central troublesome issue back into focus — is it possible to measure the toxic effect itself?

Most immediately, the comparison sketched above raises serious questions about the regulation of pornography. It is difficult to determine to what extent pornography makes the consumer dangerous. Further, the significance of the volume of consumption to the determination of an elevated risk is unclear. Unfortunately much of the research on volume of consumption is devoted to the issue of "habituation," not behavioral consequences. Researchers have concluded that continued exposure to nonviolent pornography³³ leads to a "shift in taste," i.e., an interest in "less common practices including sadomasochistic and violent sexual behaviors."³⁴ The important link to subsequent behavior by the habituated consumer is not yet established.³⁵ Conventional wisdom would suggest that he who subscribes to dozens of porno-

pornography have involved student populations. See DANIEL LINZ & NEIL MALAMUTH, *PORNOGRAPHY* 36 (1993).

33. Generally, the research has addressed the link between violent pornography and harmful effects. As for nonviolent pornography, some interesting behavioral impact is evident. Daniel Linz & Neil Malamuth refer to experiments where some types of men, after viewing pornography, stood closer to a female interviewer and "recalled more information about the interviewer's physical appearance and less of what she said" when compared to other men who had not viewed pornography. LINZ & MALAMUTH, *supra* note 32, at 53. Likewise Doug McKenzie-Mohr and Mark Zanna found that "[f]or gender schematic males [males committed to traditional sex roles] exposure to nonviolent pornography seems to influence the way they view and act toward a woman in a task oriented (or 'professional') situation . . . this group of males treated our female experimenter, who was interacting with them in a professional setting, in a manner that was both cognitively and behaviorally sexist." Doug McKenzie-Mohr & Mark Zanna, *Treating Women as Sexual Objects*, 16 *PERSONALITY & SOC. PSYCHOL. BULL.* 296, 305 (1990).

34. See LINZ & MALAMUTH, *supra* note 32, at 22.

35. Linz & Malamuth's authoritative survey does not include reference to such work.

public officials fail to capitalize on the opportunities provided by obscenity statutes, the pornography industry continues to thrive.

Group libel statutes are relatively rare in today's legislative landscape, yet they might be an instrument well suited to the claims of reformers. In the only group libel case heard before the Supreme Court,⁸⁸ Joseph Beauharnais' free speech claim was defeated at the hands of a standard based on public "order and morality."⁸⁹ Writing for the majority, Justice Frankfurter upheld an Illinois law that made defamation of a group a criminal offense; the Supreme Court would not deny a state the "power to punish [libelous] utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State."⁹⁰ In *Beauharnais* the defamed group was the "Negro" race. A Court that was becoming more sensitive to the injustices that scarred the lives of African-Americans was willing to protect that group from injurious speech. It is not hard to imagine that if the Supreme Court were to show the same sensitivity to women's rights that it once demonstrated in its race decisions, speech injurious to women's reputation would lose its elevated status in First Amendment law.⁹¹

In sum, the First Amendment obscenity exception, if enforced with vigor, can extend to pornography. The group libel exception could also be applied to pornography. The Supreme Court's willingness to create categories of speech that have little or no protection bodes well for reformers. From the very beginning (*Schenck*), First Amendment decisions stripped speech of protection when that speech presented foreseeable, albeit potential, injury. Anti-pornography reformers seek to invigorate that approach and capitalize on the likelihood of "further proliferation of unprotected speech categories."⁹²

V. CONCLUSION

For proponents of pornography regulation, the evil they battle is a situation where a man consumes violent pornography and then proceeds to re-enact those scenes with a real-life, non-consenting female victim. In many ways that scenario is the strongest argument of the movement, for the power of words to alter behavior seems perfectly clear. It is just that power that

88. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

89. *Id.* at 255-57.

90. *Id.* at 258.

91. For a more thorough analysis of group libel in the pornography context, see Jerome O'Callaghan, *Pornography and Group Libel, How to Solve the Hudnut Problem*, 27 NEW ENG. L. REV. 363 (1992).

92. Chayes, *supra* note 78, at 145.

caused Justice Holmes to create the famous “clear and present danger” test.⁹³ It is just that power that is at the heart of many of the exceptions carved into the reach of the First Amendment.⁹⁴ Beyond First Amendment law there are other precedents that reveal the liability of one who influences a wrongdoer.

In civil law the example of a bartender or social host who is held partly liable for the actions of a drunk driver⁹⁵ parallels the situation of a supplier of pornography to an individual who, while “under the influence” commits a sexual assault. On the criminal side of the law, DUI provisions might inspire criminal sanctions for elevating the risk of harm by simply being under the influence of pornography.⁹⁶ The central question in both instances regards causal connection. Anti-pornography reformers, in contrast with their DUI colleagues, face an enormously difficult task in establishing that causal connection. A myriad of factors, both public and private, can be linked to the mental state that prompts the behavior/pathology of an individual. Further, as this paper has attempted to demonstrate, the logic of the reform argument depends on an elusive quantification of the influence of ideas on behavior. Determining with some accuracy the relevant influences behind violent behavior against women is an enormous task for criminal, or civil, law. When it comes to behavior that is discriminatory or disrespectful, but not violent to women, the task becomes even more complicated. The unequal pay strategies that disadvantage women could be linked not only to a pornographic mindset prevalent in the male population, but also to a wide variety of economic and historical variables including the behavior of prior generations of women. It is an intriguing intellectual challenge, akin to the labor of Sisyphus, to unravel all those strands in order to eventually place a measurable amount of blame on the consumers and/or publishers of *Playboy* and *Penthouse*.

93. See *Schenck v United States*, 249 U.S. 47 (1919).

94. Well-recognized exceptions to the reach of the free speech guarantee include, defamation, fighting words, obscenity, child pornography, and the Brandenburg standard that replaced the clear and present danger test. For a general discussion of exceptions to free speech, see ROBERT STEAMER & RICHARD MAIMAN, *AMERICAN CONSTITUTIONAL LAW*, 305-317, 1992.

95. See *supra* note 17.

96. The reform argument could reach far beyond material currently understood to be pornographic. There is the very interesting possibility that much mainstream entertainment, non-pornographic entertainment, promotes/glamorizes discrimination and/or violence against women. See LINZ & MALAMUTH, *supra* note 32, at 51-52.

of it will be protected. When the Court's sensibilities are truly offended, as was the case with child pornography, the Court refuses to protect the offensive speech.⁷⁷ A Supreme Court sensitive to the wishes of the majority created a child-pornography exception to the Free Speech Clause that bore little or no relation to established First Amendment doctrine.⁷⁸ The principle is relatively simple: when offensive speech is labeled "evil" or "dangerous," it loses its protection. As Justice White put it:

[i]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case by case adjudication is required.⁷⁹

Likewise, should a speech be offensive in the sense that it is perceived to threaten national security, it is likely to lose protection. In sum, the issue of whether or not speech is called "offensive" does not determine anything. The Supreme Court's First Amendment jurisprudence rests on a "categorical approach"⁸⁰ that invites speculation as to what new categories of speech will be added to the list and so lose constitutional protection. The offensive nature of the speech will play a leading role in that choice.

B. The First Amendment Demands Imminent Injury Before Speech Can Be Prohibited

This argument relies heavily on the "imminent and likely" criteria applied in *Brandenburg v. Ohio*.⁸¹ While it is true that the Court dealt with the ambiguity of the "clear and present danger" test by emphasizing imminent injury, that holding does not extend to other free speech decisions. Considerably more instructive on the question of imminent harm is the Court's explanation of the obscenity category of unprotected speech. In *Paris Adult Theatre v. Slaton*,⁸² the Court refused to examine empirical data on the rela-

Justice Brennan).

77. *New York v. Ferber*, 458 U.S. 747 (1981).

78. "Justice White identified a new area of unprotected speech without articulating a coherent constitutional theory to explain such a result; moreover, he did so with a nonchalance that portends further proliferation of unprotected speech categories." Abram Chayes, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 4, 145 (1982).

79. *Ferber*, 458 U.S. at 763-64.

80. For a recent analysis of the categorical approach see *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992).

81. 395 U.S. 444 (1969).

82. 413 U.S. 49 (1973).

tionship between obscenity and social harm:

[I]t is argued, [that] there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is 'impermissible'. We reject this argument. . . . Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding Roth, this court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "the social interest in order and morality."⁸³

This rejection of the need to prove a relationship between speech and harm illustrates that, *in the absence of actual or imminent injury*, speech may be prohibited in order to protect "the social interest in order and morality."⁸⁴ Close analysis of the categorical approach reveals that in general "several classes of speech are denied protected status on account of potential, not actual, harmful results."⁸⁵ First Amendment jurisprudence reveals a "tension between robust protection of offensive expression, and protection of the dignity and physical integrity of potential victims of such expression."⁸⁶ That tension remains unresolved.

C. First Amendment Exceptions Do Not Extend To Pornography

At present, pornography does count as protected free speech. However, two established categories of unprotected speech, obscenity and group libel, could be marshaled to aid the reformer's argument. Obviously the obscenity category was designed to resolve problems associated with sexually explicit speech. The Court's current definition of obscenity⁸⁷ is in fact flexible enough to reach much of the material that MacKinnon has attacked. In practice the obscenity standard has had little effect on the pornography market. The difference between the potential and actual effect of the obscenity standard may well be explained by another variable: political will. To the extent that

83. *Paris Adult Theatre v. Slaton*, 413 U.S. at 60-61.

84. This language appeared in the original fighting-words case, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Though *Chaplinsky* was thought a dead end in constitutional doctrine, the current Court has seen fit to rely on it in an important free speech case: *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992).

85. Jerome O'Callaghan, *Pornography and the First Amendment*, in *POLITICS AND POLICY: UNITED STATES AND TEXAS* 64 (Nelson Dometrus et. al., 1993).

86. Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 212 (1991).

87. See *Miller v. California*, 413 U.S. 15 (1973).

III.B. THE IDEAL ARGUMENT

The DUI example is an intriguing one because in it we find extensive quantification of harm. Government has convinced the public that sober drivers⁷¹ are statistically less likely to be involved in an accident than are drunk drivers. In the absence of evidence to support the propaganda, there would appear to be no justification for DUI laws.

The analogy with pornography raises a very difficult question: how might government quantify the danger? Ideally the data would indicate that statistically speaking, women in a pornography-free society would be significantly less likely to suffer from, say, violent attacks by males. Given the prevalence of pornography in American society,⁷² such a conclusion is impossible to draw from contemporary domestic research. Cross-national comparisons might fill the void, but such research is vulnerable to a wide range of critique. The anti-pornography movement should be well aware of the nature of these critiques, since many were used to attack the conclusions of the 1970 Commission on Obscenity and Pornography.⁷³ A subsequent problem concerns finding any population that is both comparable to the U.S., and effectively pornography-free. Even industrialized Western nations with long-standing censorship systems, such as Ireland have flourishing black markets in pornography. Communist countries are no longer havens from pornography.⁷⁴ It may be that the only societies that can truly eliminate pornography from popular culture are fundamentalist ones, such as Saudi Arabia. If a comparative study indicated that women in a pornography-free society suffered significantly less injury, the central methodological issue of separating

71. Sober drivers in this instance refers to those whose BAC is below legally significant levels.

72. Trends in pornography evidently affect the mainstream advertising industry — one famous example is a poster, used to promote a Rolling Stones album, that depicted women enjoying battery. See BERGER ET. AL., *supra* note 42, at 32.

73. See DONNERSTEIN ET. AL., *supra* note 42, at 38-73.

74. Evidently the former Soviet Union and its allies had some success in eliminating pornography from the market. In the last few years the former-communist nations have experienced a flood of pornography. Recent news reports identified "swelling public clamor against the stag films, girlie calendars and sex manuals flooding the Soviet Union at unprecedented levels." See Carey Goldberg, *Soviets Act on Furor over Pornography*, L.A.T., April 13, 1991, at A11. Pat Widder, *After Communism Fell so did the Moral Barriers on Formerly Straight-Laced Soviet T.V. Unregulated Pornography Can Now be Seen on Many Russian TV Stations*, CHIC. TRIB., Feb. 16, 1993, at C1. See also one reporter's view of change in Hungary: "In the first year of liberation, no fewer than 400 new publishing houses sprang up. For that one year, the public fell upon what could not previously be printed: outright anti-Communist literature, attacks on the Soviet Union, and pornography — the latter proving . . . the most flourishing and probably the most lasting of the lot, with no fewer than 90 magazines being devoted to the kind of porn Germans cross the border into Belgium or Holland to buy." THE INDEPENDENT, Aug. 13, 1991, at 17.

causality and correlation would still have to be addressed.

If the problem of finding a true measure of pornography's actual societal effect can be surmounted, then three types of conclusions could be reached. First, the extent of pornography in the popular culture makes no demonstrable difference to the experience of women. If that were true, pornography is inconsequential; it is, as it has been promoted, just fantasy. Second, women in restrictive societies suffer greater injury than their U.S. and western counterparts. In this event, it would appear that another argument, that pornography increases women's safety by diverting male energies, could carry some weight. The 1970 Commission flirted with a similar conclusion: "analyses for Denmark show that in that country the increased availability of erotica has been accompanied by a decrease in sex crimes."⁷⁵ The third outcome is the *raison d'être* of the anti-pornography movement. It states that women in the U.S. suffer more than their counterparts in pornography-free societies. Such a result would justify the kinds of reform promoted in Indianapolis and adopted in Canada. If a false shout of fire is punishable because of foreseeable, albeit potential, injury, so too is the distribution of pornography.

IV. HOW RELEVANT IS THE FIRST AMENDMENT?

Liberal arguments often rely on the First Amendment as a form of "check-mate" to any call for anti-pornography reform. In this section I will examine three versions of the liberal position, and I will argue that each fails to resolve the issue. The First Amendment has been a very flexible tool for both suppression and liberation of speech. It is not a blank check issued to all speakers. First Amendment doctrines are not dispositive of the central quandary posed by the anti-pornography movement.

A. *The First Amendment Protects Offensive Speech*

This argument misses a central point of anti-pornography claims, that the "speech" involved in pornography typically is harmful in its creation and has harmful consequences. More importantly this principle of protecting offensive speech⁷⁶ is riddled with inconsistencies. The kind of speech that the Supreme Court finds offensive can, and will, vary from time to time. Some

75. THE PRESIDENT'S COMMISSION ON OBSCENITY 286 (1970). This conclusion has been severely criticized. Irene Diamond, *Pornography and Repression: A Reconsideration of "Who" and "What"*, in TAKE BACK THE NIGHT, *supra* note 22, at 187, 203.

76. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (court opinion written by

harm, but is wary of government intervention.

III.A. A FAULTY ANALOGY

This construction of an analogy between DUI and pornography regulation should not be understood as an assertion that there are no significant distinctions to be made between the two. In the following paragraphs some of these distinctions are tentatively explored.

One could argue that the analogy does not hold because drugs in general, and alcohol in particular, act at a physical level over which the individual has little or no control. Physical and intellectual consumption are significantly different.⁶³ I cannot drink a pint of whiskey and choose not to get drunk. I can read all of Rush Limbaugh's works and choose to ignore his ideas, arguments, assertions, etc. At least theoretically one can choose not to be influenced by what is read or observed. Yet the distinction is not so clear. The material one reads may well influence the reader at an unconscious level — in which case it could be all the more pernicious. In addition there is the possibility of addiction in the realm of intellectual consumption. Some people will consume all of Limbaugh and believe every word. Academia, perhaps more than elsewhere, is a breeding ground for such literary/intellectual addictions.

Another reason one could argue the analogy does not hold is that pornography, as a public policy issue, is "gendered" while DUI is not. At one level the anti-pornography movement is not concerned about the impact of pornography on female consumers, if only for the simple reason that women do not perceive other women as a threat to their physical well-being.⁶⁴ At another level the movement is concerned about the development of a false consciousness among all persons.

If MacKinnon's arguments are to be taken seriously, then the immediate victims of pornography are men and women. Just as the victims of drunk drivers, they suffer from both "virtual" and real injuries. Pornography instructs each in a false ideology. In both instances the ideology leads to

63. Some argue that there is no intellectual consumption of pornography — "much pornography is more accurately treated as a physical rather than a mental experience" or "[w]hat defines pornography is its lack of intended intellectual appeal." These comments make more sense as rhetorical devices; the existence of an enormous controversy over pornography is the first indication that its intellectual content is significant. Certainly feminists are agreed that, in the spirit of a picture being worth a thousand words, pornography speaks. FREDERICK SCHAUER, *FREE SPEECH, A PHILOSOPHICAL INQUIRY* 182-83 (1982).

64. It is argued that spousal battery (male attacking female) is the single most common criminal offense in the U.S., see Laura L. Crites, *Wife Abuse: The Judicial Record, in WOMEN, THE COURTS AND EQUALITY* 38, 39 (Laura L. Crites & Winifred L. Hepperle eds., 1987).

personal frustration. In males, that frustration can lead to criminal or other legally injurious acts. This second generation of injury is felt almost exclusively by females. Here the analogy with victims of drunk driving simply does not hold because drunk drivers do not discriminate in the persons they injure.

In addition one should note another aspect of the gender element in this public policy problem. Males dominate government. When males, via government, regulate drunk driving, they regulate a male and female population. However, should they regulate pornography consumption they would be addressing a population that is predominantly male. One interpretation of the last decade of failed anti-pornography reforms⁶⁵ is that government's reluctance to take a more aggressive stand on pornography is merely protection of a male prerogative.

Another possible contrast between these two policy areas lies in the question of definition. A central legal problem, one that caused the derailment of the Indianapolis reform,⁶⁶ is how to define pornography itself. However, the definition problem is overstated. When it comes to "obscenity,"⁶⁷ to "clear and present dangers,"⁶⁸ to "child pornography,"⁶⁹ or even contracts "in restraint of trade"⁷⁰ the courts have managed to overcome many apparent difficulties. Likewise the legislature and the public, many of whose members "know it [pornography] when they see it," may with some effort construct an adequate definition of pornography. The problem is one of political will, not semantics. For that reason the question of defining pornography, politically acute as it is, does not contrast with the apparently simple task of defining "alcohol" for the purposes of public policy.

65. While Congress has considered a proposal to compensate the victims of pornography, see *A Damaging Remedy for Sex Crimes*, N.Y.T., Apr. 13, 1992, p. A18, legislative success has been relatively rare for the anti-pornography movement. The first example of judicial acceptance of feminist arguments is in the Canadian Supreme Court. See *Butler v. Her Majesty the Queen*, 1 S.C.R. 452 (1992). This contrasts with the major U.S. decision on pornography, *Hudnut v. American Booksellers Ass'n, Inc.*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). See also *Despite 6-Year Campaign, Pornography Industry Thrives*, N.Y.T., July 1, 1993, p. A20.

66. See *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d at 332.

67. See *Miller v. California*, 413 U.S. 15 (1973).

68. See *Schenck v. United States* 249 U.S. 47 (1919).

69. See *New York v. Ferber*, 458 U.S. 747 (1982). Some might argue that if the Supreme Court can recognize child pornography as a danger to society (as it did in *Ferber*), then it can/should recognize adult pornography. That strategy raises a specter of putting women and children in the same legal boat, and the history of feminist movements indicates that that is a boat women have long sought to exit.

70. For a discussion of the inherent ambiguity in important legal terms, see LIEF H. CARTER, *REASON IN LAW* 56-57, 98-107, (4th ed. 1994).